

EBENEZER A. LESTER.

[To accompany bill H. R. No. 23.]

FEBRUARY 29, 1840.

Mr. RUSSELL, from the Committee of Claims, made the following

REPORT:

The Committee of Claims, to whom was referred the petition of Ebenezer A. Lester, praying remuneration for losses sustained on a contract with the Government, the completion of which was delayed by the United States beyond the period fixed by the contract for its execution, report :

The petitioner states that, on the 24th day of July, 1827, he contracted with the Board of Navy Commissioners of the United States, through their engineer, Loammi Baldwin, Esq., to make and erect, for the service of the United States, in the navy yard at Charlestown, for the use of the dry dock then constructing at that place, a steam-engine of fifty-horse power; he was to find the materials, and do the labor, and erect the engine in such place as the said Baldwin or the engineer for the time being for building said dry dock should designate, to be completed within the period of five months from the 25th day of June preceding the date of said contract: in default whereof, he was to forfeit and pay to said commissioners \$500; and in case he should fail to complete the same within one month after the expiration of said period, he was to forfeit and pay to said commissioners the further sum of one thousand dollars.

In consideration whereof, he was to receive from the United States the sum of seven thousand five hundred dollars, to be paid at the expiration of said five months, if the work should then be completed to the satisfaction of said engineer: that payments were to be made from time to time, as the work progressed, but were not to exceed in amount three-fourths of the value of the materials provided and labor bestowed at the time of said payments, leaving one-fourth to be paid at the expiration of said term, if said contract should be performed on the part of the petitioner: that he proceeded to construct said engine, and completed the same, as far as it depended on him, and was ready and able to have erected and finished the same within the time limited, and would have done so if he had not been prevented from delivering the same at the navy yard, and from completing it there, by the said engineer; the previous preparation for the erection and completion of said contract not having been made by the Government, to enable the petitioner to perform on his part, it having been deemed, by the said engineer, advantageous to the United States to delay the completion thereof until the construction of the dry dock should be further advanced; by reason whereof, the payments were delayed for a long time, and the last until the 14th of December, 1832.

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In consequence of the temporary abandonment, on the part of the Government, of the performance of the contract, the petitioner alleges that he was subjected to great loss, expense, and inconvenience, and subjected to the payment of large sums of money for labor, materials, insurance, and interest, beyond what he would have been subjected to if he had been permitted to proceed and execute the contract on his part, according to the letter, true intent, and meaning thereof.

The committee have been furnished with the original contract and the documentary evidence herewith submitted, which, in the opinion of the committee, fully establish the obligations above referred to. When the contract was entered into, it was intended by the engineer to have the engine completed with all possible expedition, to use in draining the works while the dry dock was constructing; and to secure this object, the large amount of liquidated damages to which the petitioner was subjected for non-performance was incorporated into the contract; but before the expiration of the five months, (the time limited for the execution of the contract,) and while the petitioner was vigorously prosecuting the work, and on the eve of completing it, the engineer changed his views, and directed the petitioner to postpone the completion of the engine until the dry dock should be finished, which it is alleged did not take place until December, 1832; thus subjecting the petitioner to the consequences hereinbefore referred to. This claim was presented to Congress, and, in the House of Representatives, referred to the Committee of Claims in January, 1834, and again in 1835; and in 1836 a bill was reported for the petitioner's relief, but which, for want of time, was not further acted upon at that session. At the session before the last it was again referred to the Committee of Claims, and a detailed report made thereon to the House, with a bill for the petitioner's relief. (See House Rep. No. 8, 2d session 25th Congress). This bill passed the House of Representatives, and was sent to the Senate for their concurrence, and was there referred to the Committee of Claims, which made a verbal report thereon to the Senate, with a recommendation that said bill be rejected; whereupon the Senate, as in Committee of the Whole, postponed the further consideration of said bill indefinitely.

Under these circumstances, the attention of this committee has been directed to this claim with increased scrutiny, with a view to discover, if possible, the ground upon which the bill was rejected in the Senate; but the committee have not been able to discover any satisfactory reason for such rejection. No principle of legislation hitherto established would have been violated by the passage of that bill; nor can the committee discover any well-founded objection to the bill, arising from expediency; and though, in the estimation of the Senate, good and sufficient reasons may have existed which called for the indefinite postponement of the bill, as this committee have not been able to discover them from the act of postponement, they cannot adopt them as rules of conduct until they shall have been communicated in a more convincing form.

The principle upon which that bill rested has long since been incorporated in the legislation of the United States; it formed the basis for the relief granted to Harris and Farrow in 1823. The contractors in that case agreed to construct and erect a fortification on Dauphin Island. The work was to have been commenced on or before the 1st of December, 1818, and to have been completed by the 1st of December, 1821. On the 12th of November, 1818, the contractors were at the island with a large outfit of

mechanics and laborers ready to commence the work, but, in consequence of the absence of the engineer who was to superintend the execution of the work, they were unable to commence it until the 22d of January, 1819, when the work was commenced, and prosecuted by the contractors until the spring of 1821, when they were required to stop, and soon after the contemplated improvement was abandoned by the Government. For the damages which the contractors sustained, occasioned by the absence of the engineer from the 1st of December, 1818, until the 22d of January, 1819, and for various other damages occasioned by the delay and final abandonment of the improvement, the sum of \$73,747 78 was paid to the contractors. It was upon this principle, also, that the law was passed for the relief of Austin and Tailor. (See Rep. House of Representatives No. 694, 1st session 24th Congress.) And in many other cases this principle has been brought to the notice of Congress, and sanctioned, by affording indemnity to individual sufferers.

In the case under consideration, the petitioner had invested his capital in procuring materials, and in employing and sustaining laborers and mechanics, with a view of executing his contract according to its provisions, and thereby saving himself from the exactions of the liquidated damages provided for in the contract, in the event of non-performance on his part; and when thus successfully prosecuting the work, he was suddenly arrested in his progress by the Government, upon the suggestion that the interests of the United States would be promoted by suspending the execution of this contract until the dry dock should have been constructed, and the execution of the contract for the construction of the engine was accordingly suspended; in consequence of which, the petitioner alleges he sustained damages to the amount of \$653 77, exclusive of interest since the 14th day of December, 1832, which he prays may be allowed him.

In answer to a communication made to Mr. Baldwin, the engineer, he writes to Commodore Rodgers as follows:

"I have no doubt that he (Lester) would punctually and faithfully have performed all his covenants and agreements within the time specified, had he been requested, and the public service had required it; and I hope the department will feel justified in making Mr. Lester some allowance on the ground of his claim, which appears to me both equitable and just."

On the 8th of February, 1834, this petition and the documents accompanying it were handed to the engineer, Mr. Baldwin, who, on the same day, returned an answer, from which the following extract is taken: "I have read Mr. Lester's petition to Congress, with the other papers you handed me this morning, and, in compliance with your request, will make the following statement: All the facts Mr. Lester has given in his petition are substantially correct, and I have no doubt the sum he makes out upon the principles whereon he founds his claim is just; for, when I wrote from Norfolk my letter of January 9th to the Board of Navy Commissioners, a copy of which is with the papers delivered me, I made a calculation from the data then before me, but not now within my reach, which fell a little short of the amount of \$700, which was given in his letter of that time. If interest from the date of his last payment (December 14, 1832) to this time, be allowed upon \$653 77, the whole will be very nearly \$700."

There appears, then, to be no dispute with those most familiar with the transaction out of which this claim has arisen; nor is there a doubt entertained that damage to some amount has been sustained by the petitioner,

from the causes hereinbefore referred to ; and as it is a transaction of recent date, and the adjustment of which properly belongs to the Department of the Navy ; and the committee being fully satisfied that the claim, to some extent, at least, is just and equitable, and the petitioner entitled to relief, they have prepared a bill for that purpose, which they herewith report to the House. The petitioner's claim for interest after the 14th December, 1832, cannot be sustained.

NORFOLK, *January 9, 1834.*

SIR : On the 7th instant I received your letter of the 3d, relative to Mr. Lester's claim for interest, &c., on account of the great steam-engine for the Boston dry dock ; but regret that I cannot be very full or minute as to the facts in the case, as my papers, accounts, &c., are principally at Charlestown. I will state them as far as I can.

When we signed the contract, (July 24th, 1827,) it was my intention to use the great engine, in a temporary way, for draining the works ; and of course I was anxious to have it ready, with the pumps and other machinery, as early as possible, and brought Mr. Lester down to the earliest period he could fix for having the engine ready, so as not to disappoint us ; and in order to secure his attention to the contract, I inserted the two forfeitures in the contract to which he alludes in his letter.

Soon after this contract was made, I began to reflect upon the policy and economy of this provision for draining, and was at last convinced, for many reasons which I need not state now, that it was much better to procure a small engine exclusively for draining, and reserve the great one until the engine-house, great well, &c., for its permanent establishment, should be ready. The result was, that I made the contract with him for a small engine, pumps, &c., dated November 10, 1827.

At this time nearly four months had expired since the first contract was entered into, and Mr. Lester, as far as I can now recollect, had done most of the heavy and important part of the work under the first contract ; and I have no doubt he would have been ready, if we were, to have performed every part of his contract according to its stipulations.

My impressions in this respect are strengthened by the circumstances, that, on the 29th of September, 1827, I paid him \$1,000 ; November 10, 1827, the day we signed the contract for the second engine, I paid him \$2,000. I well remember my caution about overpaying, and his being easily satisfied with the payments, when I thought, strictly speaking, he might fairly claim (as most men would) a greater amount of pay for the work then executed.

When the second engine was concluded upon, no inconvenience could arise to the labors of the dock, from a total suspension of the work upon the first. But Mr. Lester went on with it pretty much, I presume, to suit his own convenience, and to comply with the terms of his contract, except the erection of the engine, in order to entitle himself to his pay. That he did not, from the beginning, proceed to the accomplishment of his contract, and fully and faithfully entitle himself to the final payment of the \$7,500 according to the conditions and stipulations of his undertaking, was not his fault ; but it was owing to a change of plans on the part of Government, which would have rendered a strict and literal compliance

with the terms of contract on his part unnecessary, and even prejudicial to us.

I believe the engine was nearly or quite finished, as it stood in his shop, in April, 1828; and during the summer of 1828 Mr. Lester delivered the three boilers in the yard; and in the winter of 1828-'9, while I was at this office, he delivered the engine and all its parts, ready for being put up. It was set up in a shed erected for that purpose in the yard, and the boilers were also safely covered from the weather by a shed, near the shiphouse. These circumstances will probably be recollected by Commodore Morris. Such are the facts, as far as I am able to state them.

The statement given in Mr. Lester's letter to the Secretary, as to the several amounts and respective times of payment under the contract, is correct. I have no doubt that he would punctually and faithfully have performed all his covenants and agreements within the time specified, had he been requested, and the public service had required it; and I hope the department will feel justified in making Mr. Lester some allowance, on the ground of his claim, which appears to me both equitable and just.

With great respect, &c.,

L. BALDWIN.

Commodore JOHN RODGERS.

This agreement, made this twenty-fourth day of July, in the year of our Lord one thousand eight hundred and twenty-seven, by and between Ebenezer A. Lester, of Boston, in the county of Suffolk and Commonwealth of Massachusetts, steam-engine maker, on the one part; and Loammi Baldwin, of said Boston, engineer, acting for and in behalf of the Board of Navy Commissioners of the United States, for building a dry dock in the navy yard at Charlestown, on the second part, witnesseth:

1. That in consideration of the covenants and agreements hereinafter mentioned, made by the said Baldwin, for and in behalf of the said Commissioners, the said Lester hereby covenants and agrees to and with the said Commissioners to make and erect, for the service of the United States, in the navy yard at Charlestown, for the use of the dry dock, a good and substantial steam-engine of fifty horse power; to find all the materials, do all the labor, and erect the said engine on such ground and in such place as the said Baldwin, or the engineer for the time being for building the said dry dock, shall designate, in the following manner:

2. The engine to be of the power of fifty horses, to work with steam, at fifty pounds pressure per square inch, but to be of sufficient proportions and strength for sustaining, and working safely with, a pressure of seventy-five pounds per inch, with three good sufficient wrought-iron boilers, of such proportion and such strength as safely to sustain a pressure of two hundred pounds the square inch, to be so constructed, placed, and arranged, and with such requisite pipes, tubes, cocks, valves, &c., that in case accident or other circumstance shall require it, all three boilers, or any two of them, may be conveniently used together, or any one of them alone; with two forcing-pumps and a lift-pump, a hot water chest, two balance wheels, and a regulator or governor; with two working shafts adapted to and moved by the engine, so that either shaft may be applied to working pumps, or, by means of drums or other apparatus, either may be used for

driving machinery or doing other work ; the frame of the engine to be of iron, and all the boxes or pillows to be of composition or gun-metal ; to make and apply the pump for filling the boilers and supplying the engine, &c., together with the necessary tubes, pipes, and other apparatus, provided the well or other source from which the engine is to be supplied is not more than fifty feet from the engine.

3 That the said Lester will provide the materials, and do all the labor of making, fitting up, and preparing the said engine, in the navy yard at Charlestown, ready for working and being applied to the operation of pumping or moving other machinery, within five months from and after the twenty-fifth day of June last past, with all the several parts of suitable dimensions, proportions, and strength, in a good, faithful, substantial, workmanlike manner, to the acceptance and satisfaction of the said Baldwin, or other engineer for the time being ; the said United States to be at the expense of preparing the engine foundation, engine-house, setting the boilers, building the chimneys, and providing a well for the use of said engine.

4. And the said Lester hereby covenants and agrees to and with the said Commissioners, that in case he shall fail faithfully to perform and execute his covenants and agreements herein made, and to make, furnish, and erect the said engine in said yard, in manner aforesaid, and within the said period of five months, he will forfeit and pay to the said Commissioners the sum of five hundred dollars ; and in case he shall fail and neglect the same for one month after the expiration of said five months, he will forfeit and pay, as aforesaid, the further sum of one thousand dollars ; and that he will, upon the signing of this agreement, give bonds, with good and sufficient security, for the faithful performance of all his covenants, promises, and agreement herein contained ; and that no member of Congress shall have any interest, or be in anywise concerned, either directly or indirectly, in any of the issues, profits, or receipts of this contract.

5. And the said Baldwin, for and in behalf of the said Commissioners, hereby covenants and agrees to and with the said Lester, to pay him seven thousand five hundred dollars for the said steam-engine, whenever, and within the five months aforesaid, the said Lester shall have erected and completed the same in manner aforesaid, to the acceptance and satisfaction of the said Baldwin, or other engineer for the time being ; and that he will also from time to time make partial payments of said sum, as the work of constructing said engine shall progress, provided said payments shall never amount in the whole to more than at the rate of three quarters of the amount of materials and work furnished and performed at the time of said payments, and one-quarter part to remain and not be paid until the completion of said engine, according to the terms of this contract.

In witness of all which, the parties have hereto set their hands and seals, in duplicate, the day and year first above named.

L. BALDWIN, *Engineer,*
For the Board of Navy Commissioners.
EBENEZER A. LESTER.

Signed, sealed, and delivered in presence of us :

EDWARD BATTLES.
WILLIAM ANDEM.

WASHINGTON, *February 8, 1834.*

SIR : I have read Mr. Lester's petition to Congress, with the other papers you handed to me this morning, and in compliance with your request will make the following statement : All the facts Mr. Lester has given in his petition are substantially correct, and I have no doubt the sum he makes out upon the principles whereon he founds his claim is just; for, when I wrote from Norfolk my letter of January 9 to the Board of Navy Commissioners, a copy of which is with the papers you delivered to me, I made a calculation from the data then before me, but not now within my reach, which fell a little short of the amount of \$700, which was given in his letter at that time. If interest from the date of his last payment (December 14, 1832,) to this time, be allowed upon \$653 77, the whole will be very nearly \$700.

I can now recollect no new fact or circumstance to elucidate his claim, besides those contained in his petition and in the copy of my letter of January 9. I should, in fact, have paid Mr. Lester almost all the money due on his contract, two or three years before the last payment, had I not found myself restrained by the strict terms of the agreement, retaining only three or four hundred dollars to cover the expense of erecting the engine. When I made a payment of \$1,000, on the 2d of November, 1829, (which was the last before the final settlement, December 14, 1832,) there was due him \$2,000. A little more than a quarter I had a right to retain, by the agreement; but I approved the account, in the persuasion that the remaining \$1,000 was fully sufficient to secure the Government in the only remaining part of his service, which was the erection of the engines, that could not cost him more than \$200 or \$300 at most. But even this amount was not paid, or was refused by the navy agent, or had not been allowed him at the Treasury Department, because it exceeded the amount due according to the strict letter of the contract. I then had a new account made up at my office, to which I added an explanation, showing that the remaining \$1,000 was more than amply sufficient to indemnify the Government, should Mr. Lester fail to erect the engine, the only remaining work for him to do under the contract. Upon this explanation, payment was promptly made; and when I made the final payment, in December, 1832, I should have allowed him interest which he claimed, on what I then considered just and equitable ground, but I was prevented from so doing by what I had understood to be the rule in settling accounts in the Navy Department, to allow interest in no case whatever. Indeed, I had often been told this by the Navy Commissioners.

I hope the committee will allow the claim; and, to aid Mr. Lester, I shall cheerfully attend them, and give the facts herein stated, if an opportunity be allowed me while I remain in the city.

With great regard, yours,

L. BALDWIN.

HON. GEORGE GRENNELL, Jr.,
House of Representatives.

